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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

GEORGE ALAN LEWIS,

Petitioner,

v.

JAMES CROSBY, CHARLIE CRIST, ATTORNEY GENERAL OF THE STATE OF FLORIDA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

WHETHER THE DECISION OF THE COURT OF APPEALS ON THE ISSUE OF MATERIALITY OF THE EVIDENCE CONCEALED BY THE STATE IN VIOLATION OF *BRADY v. MARYLAND*, 373 U.S. 83 (1963) CONFLICTS WITH *KYLES v. WHITLEY*, 514 U.S. 419 (1995) BY WEIGHING THE PROSECUTION'S AND PETITIONER'S TRIAL EVIDENCE RATHER THAN DETERMINING WHETHER THE *BRADY* VIOLATIONS UNDERMINED CONFIDENCE IN THE OUTCOME OF THE TRIAL.

II.

IN *BANKS v. DRETKE*, 540 U.S. 668, 690 n.11 (2004), THIS COURT EXPRESSLY LEFT OPEN THE QUESTION WHETHER A CLAIM PURSUANT TO *GIGLIO v. UNITED STATES*, 405 U.S. 150 (1972), TO WARRANT ADJUDICATION, MUST BE SEPARATELY PLED FROM A CLAIM PURSUANT TO *BRADY v. MARYLAND*, 373 U.S. 83 (1963).

THE QUESTION PRESENTED IN THIS CASE IS WHETHER THE COURT OF APPEALS ERRED IN HOLDING THAT THE PETITIONER'S FEDERAL HABEAS CORPUS CLAIMS UNDER *GIGLIO* WERE PROCEDURALLY BARRED AS NOT HAVING BEEN EXHAUSTED IN THE STATE COURTS SEPARATELY FROM HIS *BRADY* CLAIMS.

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OPINION BELOW

A copy of the unpublished decision of the United States Court of Appeals for the Eleventh Circuit, *Lewis v. Crosby*, 107 Fed.Appx. 892, 2004 WL 1347034 (11th Cir.June 9, 2004), which affirmed the judgment denying habeas corpus relief entered by the United States District Court for the Middle District of Florida, is contained in the Appendix. (App. A).

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was filed on June 9, 2004. (App. A). On October 27, 2004, the Eleventh Circuit entered an order denying the petitioner's timely filed petition for rehearing and rehearing. (App. B). A timely filed application for extension of time for filing this petition for writ of certiorari was granted to February 28, 2005. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The petitioner is a Florida state prisoner serving a life sentence for murder and rape. The petitioner filed a federal petition for writ of habeas corpus seeking relief based upon the prosecution's violations of *Brady v. Maryland,* 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972). The petitioner claimed that the State concealed voluminous evidence, uncovered by the petitioner after his trial, supporting his defense that the murder and rape were committed by one Peter Kumble, a witness for the prosecution.

At the petitioner's state jury trial, the prosecution contended that the petitioner was guilty because his bare footprint was found at the crime scene. The prosecution also argued that the petitioner's inconsistent statements to the authorities were evidence of his guilt. To rebut Kumble's guilt, the prosecution presented testimony that during the police investigation, unlike the petitioner, Kumble never made any inconsistent statements. (App. C at 5-6).

At the trial, the prosecution successfully contended in the presence of the jury that the petitioner lacked evidence to

accuse Kumble. The following took place when the petitioner's counsel sought to cross-examine Kumble about his guilt:

> PETITIONER'S COUNSEL: Isn't it a fact, sir, that on Tuesday evening, you and Mr. Kuhar [Kumble's roommate] were out for the evening and you went by the Mackey residence [the crime scene]?
> KUMBLE: No, that's not a fact.
> PETITIONER'S COUNSEL: You stopped there to see Ms. Gregory [the victim]. You made advances. She became angry with you, and you killed her.
> KUMBLE: No, sir.
> PROSECUTOR: Excuse me a second. I want -- that's improper for this lawyer to ask a question that he has absolutely no good faith basis to put that on before this jury. And that's why I want the Court to instruct that jury to disregard that question.
> THE COURT: Sustained. Ladies and gentlemen, you should disregard the last statement by counsel.

(App. C at 6). Consequently, the petitioner's defense was effectively limited to his own testimony and the testimony of his wife.

The petitioner testified that at the time in question, he lived with his wife across the street from the house of the victim's boyfriend where the murder and rape took place. The petitioner did not know the victim. On the evening of the murder and rape, he was in his garage welding a bumper for a lieutenant in the fire department where the petitioner was employed as a firefighter. The petitioner had just finished the welding and removed his boots when he heard a scream. He opened the garage door, turned off the garage light, looked around, and observed someone standing near the house where the murder took place. The petitioner asked if anything was wrong. The stranger told the petitioner to mind his own business and leave. The stranger walked away. (App. C at 7).

The petitioner walked toward the house and observed broken glass on the sidewalk. The petitioner knocked on the front door and there was no answer. Believing something was wrong, he went around the house where there was one back window with the shades open. He crawled through the

window and observed the victim. The gruesome scene caused him to walk to the bathroom and vomit. The petitioner did not call the police because he was terrified that his presence at the scene would make him a suspect and the authorities would not believe that he entered the window out of curiosity. He returned home.(App. C at 7-8).

The petitioner described the stranger to the police and a composite drawing was created. The petitioner was later shown a photograph and said: "[T]hat's him." The photograph was of Kuhar, the roommate of Kumble. As it turned out, Kuhar was Kumble's sole alibi for the night of the murder. (App. C at 8).

The petitioner's wife testified that she was awakened by the scream, looked outside, but saw nothing. She saw that the garage light was off and the garage door open. She sat in the kitchen next to the window. Right outside the window was the hose which she did not hear, but would have. (The prosecution speculated that the petitioner had turned it on to hose off blood.) She waited for the petitioner. About ten minutes passed and he came in looking pale. However, there was nothing else unusual about his appearance. The petitioner told her that he heard the scream as well. He said he would lock up and put away his tools. They went to bed. (App. C at 9). The wife confirmed that afterward, the petitioner put up floodlights, adopted a large dog, installed a telephone in the bedroom, and traded cars with her so that anyone watching the house would think someone was home and not know their routines. (App C at 9).

The jury deliberated more than two days. The petitioner was found guilty as charged. The prosecution sought the death penalty. The jury unanimously recommended life imprisonment. (App C at 10).

The presiding state trial judge ordered a new trial on the murder charge, finding that "this was a close case" and that the cumulative effect of several errors required a new trial. (App C at 10). The trial judge also entered a judgment of acquittal on the rape charge based upon legal insufficiency of the prosecution's evidence. *Id.*

The State appealed and the Florida appellate court reversed. *State v. Lewis*, 543 So. 2d 760 (Fla.2d DCA 1989) [*Lewis I*]. The cause was remanded for reinstatement of the convictions and sentencing on both charges. *Lewis I*. The petitioner was sentenced to life imprisonment for first degree

murder and 12 years for rape. The Florida appellate court affirmed the convictions and sentences. *Lewis v. State*, 566 So. 2d 270 (Fla.2d DCA 1990) [*Lewis II*].

The petitioner's trial counsel made a public records request and received voluminous records containing evidence never disclosed to the defense by the prosecution. The concealed evidence included numerous inconsistent statements made by Kumble to the authorities. The concealed evidence also established that Kumble voiced his knowledge that the victim had been raped before that fact had been released to the public. The petitioner filed his State habeas action alleging the foregoing *Brady* violations, and others, as follows:

• The State suppressed a sworn statement taken from Maureen Byrnes by two prosecutors. Byrnes stated that Kumble telephoned her and said he had just spoken with an officer at the crime scene. Byrnes testified as follows in her suppressed pretrial statement:

> [Kumble] told me that -- I believe he asked me -- he said, do you remember Karen [Gregory], and I said yeah, sort of, know, like oh, wait a second, okay. And he said -- he was very serious. His voice was real serious, and he said, well, **she was RAPED and killed**, and that caught my attention. I thought he was just originally going to just -- to tell me about somebody. And I either asked him or he told me, how did you find out about that, and he said he had just gotten off the phone with the police -- Gulfport Police.

(App C at 11) (emphasis supplied). Because Kumble had not been told by the police that the victim had also been raped, *id.*, Kumble's statement was material to his guilt and the petitioner's innocence;

• The State concealed a 22-page Supplemental Report of Detective Brinkworth [Brinkworth's Report] (App. C at 11-14) which revealed witnesses who would have testified that Kumble had a romantic interest in the victim (which he denied at the petitioner's trial).Also concealed was an interview with Kumble where he was described by the officers as a "prime suspect" and with good cause -- Kumble missed teaching his yoga class on the night of the murder when he otherwise had an "impeccable" attendance record

-- a fact also concealed by the State;

• The State concealed Kumble's many inconsistent statements to the police which were evidenced in the interview. *Id.*;

• After the crimes, Kumble met with a detective who looked at Kumble's right hand and observed a fresh large scratch. The detective reported that at that moment, Kumble moved his hand off the table. (App. C at 4). During the investigation, Kumble was asked on separate occasions about the scratches on his hands. Kumble told one detective that the wounds were from playing with his dog. But he told another that the wounds were from working on his car. *Id.* The interview concluded: "[F]ollow up and investigative methods should be used in the pursuit and further investigation of a Peter A. Kumble, prime suspect at this point in the investigation..." . (App. C at 13-14);

• The prosecution concealed a memorandum which indicated that four bags of evidence seized from the crime scene were opened without authorization, deemed contaminated, and therefore not subjected to forensic analysis (App. C at 14) that would have explained why Kumble's presence at the scene was not forensically established.

A successor state judge presided over an evidentiary hearing on the petitioner's claims. The successor judge ruled that the prosecutors violated *Brady*. However, the judge denied relief primarily on the ground of lack of materiality of the concealed evidence. (App. C at 15-16).

The petitioner appealed. With regard to the prosecutor's successful objection to the above-quoted cross-examination of Kumble, the petitioner argued the following in his brief:

> It is undeniable that the *Brady* evidence discovered from the public records request would have given the defense exactly what it needed to present Kumble as a viable suspect to the jury. In the absence of this evidence, the State's objection to that tactic was sustained by the trial court, effectively crippling that aspect of the defense.

(App. D at 1).

The Florida reviewing court affirmed, but referred the prosecutors to investigation by the Florida Bar for discipline due to their violations of *Brady*. *Lewis v. State*, 714 So. 2d 1201 (Fla.2d DCA 1998) [*Lewis III*]. The petitioner sought and was denied review of his federal constitutional claims in the Supreme Court of Florida. *Lewis v. State*, 728 So. 2d 203 (Fla.1998) [*Lewis IV*].

The petitioner timely filed in the United States District Court for the Middle District of Florida a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 seeking relief for the violations of *Brady* and *Giglio*. (D1). The petitioner argued, in pertinent part, that the state habeas judge applied the wrong standards for determining materiality of the *Brady* violations and failed to conduct a collective analysis of the concealed evidence, thereby warranting federal habeas corpus relief under the Antiterrorism and Effective Death Penalty Act of 1966 [AEDPA]. See 28 U.S.C. § 2254(d)(1), (2).

The petitioner also argued that on at least three occasions, the prosecution violated *Giglio* which holds that the "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" *Id.* at 153, 92 S.Ct. at 766. First, not only were the jurors deprived of the suppressed evidence against Kumble in violation of *Brady*, the presiding trial judge sustained the prosecution's objection that the petitioner's counsel lacked a good faith basis for accusing Kumble of the crimes and instructed the jurors to "disregard the last statement by [petitioner's] counsel" (App C at 6, 36). Thus, the jurors were, in effect, instructed by the trial judge, and misled by the prosecutor to believe, that the petitioner's counsel acted in bad faith when he sought to ask Kumble whether he was the murderer. The prosecution, of course, knew better because it was possessed of all the suppressed evidence against Kumble which provided a good faith basis for the accusation.

Second, during pretrial depositions by the defense, the evidence analysts for the State were asked by petitioner's counsel why debris collected from the murder scene was not analyzed. The deponents withheld the correct answer, namely, that the evidence had been contaminated. The prosecutor who was present at the deposition failed to correct the misleading and incorrect answers, even though

she drafted the suppressed memorandum detailing the contamination. (App. C at 36).

Third, at the petitioner's trial, the prosecution sought to "exonerate" Kumble as the murderer and rapist by asking a lead detective (Tosi) if Kumble gave any inconsistent statements to the police:

> PROSECUTOR: Did Mr. Kumble ever give you or any other law enforcement officers that you used specifically in this investigation an inconsistent statement?
> DETECTIVE TOSI: None.

(App. C at 36-37).

The United States District Judge summarily denied relief in a written order that adopted nearly verbatim the written order of the State habeas judge. On appeal, the Court of Appeals affirmed. (App. A). The Court of Appeals ruled that the evidence concealed by the prosecutors in violation of *Brady* was not material because the petitioner's footprint at the scene "coupled with his failure to explain the footprint in any logical or consistent way, suffices to indicate the withheld evidence, if properly disclosed, would not have resulted in a markedly weaker case for the State or a markedly stronger one for [him]." (App. A at 2).

The Court of Appeals further found that the petitioner's *Giglio* claims were procedurally barred on the ground that they were not raised in the Florida courts and therefore not exhausted. (App. A at 3).

The Court of Appeals noted that the Florida reviewing court referred the prosecutors to the Florida Bar for their violations of *Brady* where "the prosecution's obligation to disclose evidence is greater under professional responsibility standards than under constitutional standards." (App. A at 2).

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals applied the wrong standard for determining the materiality of the evidence suppressed by the prosecution. In conflict with *Kyles*, the Court of Appeals weighed the sufficiency of the prosecution's evidence to reach the conclusion that the concealed evidence did not weaken the prosecution's case or strengthen the defense. Review is warranted due to the legal importance of the case as evidenced by the conflicts with *Kyles*.

Review is warranted for several additional reasons. First, there is strong reason to believe that the concealment of the exculpatory evidence was prejudicial. Indeed, even before the concealment was discovered, the presiding trial judge, ruling that this was a "close case,"granted a post-verdict motion for new trial on the murder charge (due to various errors) and ordered a judgment of acquittal on the rape charge due to legally insufficient evidence. Second, "cases in which the record reveals so many instances of the state's failure to disclose exculpatory evidence are extremely rare." *Kyles*, 514 U.S. at 455 (Stevens, J., concurring) (noting this as one of three reasons why the *Kyles* case merited favored treatment). Third, as the trial judge's ruling shows, even before the *Brady* violations were known, there is a "degree of doubt about petitioner's guilt ...", *id.*, that is dramatically heightened when the concealed exculpatory evidence is considered.

II.

In *Banks v. Dretke*, 540 U.S. 668, 690 n.11 (2004), this Court expressly left open the question "whether a *Giglio* claim, to warrant adjudication, must be separately pleaded [from a *Brady* claim]." *Banks* suggests that this Court's decisions in *United States v. Bagley*, 474 U.S. 667 (1985) and *United States v. Agurs*, 427 U.S. 97 (1976) answer the question in the negative.

This case presents the same important question. However, contrary to *Bagley* and *Agurs*, the Court of Appeals ruled that the petitioner's *Giglio* claims were procedurally barred under the exhaustion doctrine because the claims

were not separately pled from the *Brady* claims pled in the state courts.

This Court is respectfully requested to resolve this important legal question.

ARGUMENT

I.

THE DECISION OF THE COURT OF APPEALS ON THE ISSUE OF MATERIALITY OF THE EVIDENCE CONCEALED BY THE STATE IN VIOLATION OF *BRADY v. MARYLAND*, 373 U.S. 83 (1963) CONFLICTS WITH *KYLES v. WHITLEY*, 514 U.S. 419 (1995) BY WEIGHING THE PROSECUTION'S AND PETITIONER'S TRIAL EVIDENCE RATHER THAN DETERMINING WHETHER THE *BRADY* VIOLATIONS UNDERMINED CONFIDENCE IN THE OUTCOME OF THE TRIAL.

In *Brady*, this Court held that the "...suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. 373 U.S. at 87, 83 S.Ct. at 1196-97. The rationale of the rule of *Brady* is

> not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused.... A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty ... casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice....

373 U.S. at 87-88, 83 S.Ct. at 1197.

Since *Brady*, this Court has elaborated upon the issue of "materiality." See, *e.g.*, *Bagley*, *supra*. In *Kyles*, this Court explained that the focus is upon the fairness of the trial the accused received rather than whether a different result would have occurred had the prosecution revealed the suppressed evidence:

> [A] showing of materiality does NOT require demonstration by a preponderance that disclosure of the suppressed evidence

> would have resulted ultimately in the defendant's acquittal.... *Bagley*'s touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question [under *Brady*] is not whether the defendant would more likely than not have received a different verdict with the [suppressed] evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the Government's evidentiary suppression "undermines confidence in the outcome of the trial."

Kyles, 514 U.S. at 434, 115 S.Ct. at 1566 (quoting *Bagley*, 473 U.S. at 678, 105 S.Ct. at 3381) (citations omitted) (e.s.). This Court also stated that no *Brady/Kyles/Bagley* error can ever be harmless because a reasonable probability of a different result "necessarily entails the conclusion that the suppression must have had a substantial and injurious effect or influence in determining the jury's verdict." *Id.*

In determining materiality, four factors have emerged. First, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal. *Kyles*, 514 U.S. at 434, 115 S.Ct. at 1566). "Thus, undisclosed evidence can require a new trial even if it is more likely than not that a jury seeing the new evidence would still convict." *Id.* Second, "a defendant need not show there was insufficient evidence to convict in view of the suppressed evidence." *Id.* Third, "there is no harmless error review of *Bagley* errors." *Id.* Fourth, "materiality is to be determined collectively, not item-by-item." *Id.*

In the case at bar, the decision of the Court of Appeals conflicts with the above standards governing materiality. The Court of Appeals reasoned that the petitioner's "bloody footprint found at the murder scene, coupled with his failure to explain the footprint in any logical or consistent way, suffices to indicate the withheld evidence, if properly disclosed, would not have resulted in a markedly weaker

case for the State or a markedly stronger one for [the petitioner]." (App. C at 2). In so reasoning, the Court of Appeals engaged in a sufficiency-of-the-prosecution's-evidence-analysis which *Kyles* clearly prohibits as a factor for determining the materiality of evidence concealed by the prosecution in violation of *Brady*. See *Kyles*, 514 U.S. at 434. Consequently, the determination of materiality must not turn upon a reviewing court's evaluation of the "logic" or "consistency" of an accused's trial testimony. Such a standard of review also impermissibly substitutes the judgment of the reviewing court for that of a jury on an issue of credibility and on a cold record. Furthermore, *Kyles* holds that the test for materiality is whether the accused received an unfair trial in the absence of the suppressed evidence, meaning a trial which did not result in a verdict worthy of confidence. *Id.* That test was not applied here. The petitioner met the *Kyles* test because the concealed evidence would have allowed a reasonable jury to harbor reasonable doubts about his guilt and in fact conclude that Kumble was the perpetrator.

The reasoning of the Court of Appeals also conflicts with this Court's holding test that a petitioner is entitled to a new trial "even if it is more likely than not that a jury seeing the new evidence would still convict." *Kyles*, 514 U.S. at 434, 115 S.Ct. at 1566. That test was met by the petitioner upon the showing that the State concealed from him the following evidence: Kumble's statement that the victim had also been raped when the police had not disclosed that fact (which obviously and compellingly supported the defense theory that Kumble was the murderer and rapist); Kumble's concealment from the police of his statement to witness Byrnes that the victim had been raped; Kumble's concealment of his supposed dinner date with the victim, along with a witness's statement that the victim "did not in any way have any intentions of any type of a dinner meeting;"Kumble's statement to the police that the scene house seemed "out of character" and he saw broken glass at the scene, which directly impeached his trial testimony that there was nothing unusual at the scene; Kumble's statement to the police that he did not teach his yoga class the night of the murder, which contradicted his trial testimony suggesting that he might have taught the class that night; Kumble's statement to the police that he knew the victim's boyfriend

was out of town which impeached his trial testimony that he was invited for dinner by both the victim and her boyfriend; Kumble's statements indicating his romantic desire for and interest in the victim, which impeached his trial testimony that he had no interest in her and was not attracted to her; Kumble's inconsistencies about the wounds to his hands and his attempt to hide the wounds from the police; and Kumble's statements to various acquaintances that the victim had affairs and set herself up to be murdered. Any of the concealed evidence would support federal habeas corpus relief. When the concealed evidence is collectively analyzed, the right to relief cannot be reasonably disputed.

The voluminous *Brady* violations in this case can only be remedied with a new trial where the petitioner will have the benefit of defending with the previously suppressed evidence. The Court of Appeals deemed it noteworthy that the Florida reviewing court referred the prosecutors to the Florida Bar for discipline. That "remedy" does nothing for the accused whose constitutional right to a fair trial has been denied.

Even without the evidence suppressed by the prosecution, the presiding state trial judge found sufficient grounds to lack confidence in the jury's verdict. The judge set aside the verdict in what he expressly found was a "close case" and due to errors he perceived. Such findings by the presiding trial judge carry constitutional significance. See *Agurs,* 427 U.S. at 114 (state trial judge's determination of *Brady* violation "in the context of the entire record" was "thorough and entirely reasonable" due in part to the judge's "firsthand appraisal of the record."). By contrast, the result of the State habeas hearing in the petitioner's case, heard by a successor judge, would likely have been different if decided by the presiding trial judge.

As noted, the determination by the Court of Appeals that the suppressed evidence was not material was based in part upon an improper weighing and rejection of the petitioner's explanation of his innocence. But as the Seventh Circuit has noted: "Even innocent people may panic at a police investigation and try to lie their way to safety." *United States v. Myers*, 892 F.2d 642, 649 (7th Cir.1990). Moreover, the petitioner has no criminal background, did not know the victim, and had no motive to kill or rape her. At the very least, the suppressed evidence would have significantly

altered the investigation and preparation of the case by the petitioner's counsel, and consequently the defense heard by the jurors. And at best, the concealed evidence of Kumble's guilt, which has yet to be heard by a jury, could result in acquittal. Accordingly, the constitutional violations were severely prejudicial.

II.

IN *BANKS v. DRETKE*, 540 U.S. 668, 690 n.11 (2004), THIS COURT EXPRESSLY LEFT OPEN THE QUESTION WHETHER A CLAIM PURSUANT TO *GIGLIO v. UNITED STATES*, 405 U.S. 150 (1972), TO WARRANT ADJUDICATION, MUST BE SEPARATELY PLED FROM A CLAIM PURSUANT TO *BRADY v. MARYLAND*, 373 U.S. 83 (1963).

THE QUESTION IN THIS CASE IS WHETHER THE COURT OF APPEALS ERRED IN HOLDING THAT THE PETITIONER'S FEDERAL HABEAS CORPUS CLAIM UNDER *GIGLIO* WAS PROCEDURALLY BARRED AS NOT HAVING BEEN EXHAUSTED IN THE STATE COURTS SEPARATELY FROM HIS *BRADY* CLAIM.

In *Giglio*, this Court held that the "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" *Id.* at 153, 92 S.Ct. at 766. A *Giglio* violation can take place even when the deliberate deception by the prosecution or false evidence pertains solely to the credibility of a witness:

> The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible

> interest of the witness in testifying falsely that a defendant's life or liberty may depend.

Napue v. Illinois, 360 U.S. 264, 269 (1959).

In his federal petition for writ of habeas corpus and before the Court of Appeals, the petitioner argued that the prosecution violated the above principles of law on at least three occasions, each arising from the *Brady* violations First, the presiding trial judge sustained the prosecution's objection that the petitioner's counsel lacked a good faith basis for accusing Kumble of the crimes and instructed the jurors to "disregard the last statement by [petitioner's] counsel" (App. C at 6). Second, during pretrial depositions by the defense, the evidence analysts for the State were asked by petitioner's counsel why debris collected from the murder scene was not analyzed. The deponents withheld the correct answer, namely, that the evidence had been contaminated. The prosecutor who was present at the deposition failed to correct the misleading and incorrect answers, even though she drafted the suppressed memorandum detailing the contamination. (App. C at 36). Third, at the petitioner's trial, the prosecution sought to "exonerate" Kumble as the murderer and rapist by asking a lead detective (Tosi) if Kumble gave any inconsistent statements to the police:

> PROSECUTOR: Did Mr. Kumble ever give you or any other law enforcement officers that you used specifically in this investigation an inconsistent statement?
> DETECTIVE TOSI: None.

(App. C at 36-37). Both the prosecutor and the detective knew the answer was false as established by the suppressed evidence of Kumble's interview. This tactic of the prosecutor and detective was obviously designed to suggest falsely to the jury that Kumble must be innocent because he, unlike the petitioner, made no inconsistent statements.

The Court of Appeals ruled that the petitioner failed to exhaust the above claims because he did not raise them in the Florida courts. (App. A). Consequently, this case presents an important question expressly left open by this Court in *Banks*.

Banks, a state prisoner sentenced to death for murder, sought federal habeas corpus relief based upon the prosecution's concealment of exculpatory evidence involving Robert Farr, a prosecution witness. The Fifth Circuit reversed the federal district court's grant of relief. This Court granted review and held that the Fifth Circuit erred in dismissing Banks' *Brady* claim regarding Farr. In ruling that Banks satisfied the exhaustion requirement as to this *Brady* claim because he alleged in his state-court application for a writ of habeas corpus that the prosecution knowingly failed to disclose exculpatory evidence concerning Farr, this Court noted the following with regard to the *Giglio* issue in the case:

> Banks' federal habeas petition, the Court of Appeals said, stated a claim, only under *Brady*, that material exculpatory or impeachment evidence had been suppressed, not a claim under *Napue* and *Giglio* that the prosecution had filed to correct Farr's false testimony. **In its view, the Court of Appeals explained, a *Brady* claim is distinct from a *Giglio* claim; thus the two did not fit under one umbrella. But cf. *United States v. Bagley*; *United States v. Agurs*.** On brief, the parties debate the issue. Because we conclude that Banks qualifies for relief under *Brady*, **we need not decide whether a *Giglio* claim, to warrant adjudication, must be separately pleaded.** [citations to record and cases omitted; emphasis supplied].

Banks, 540 U.S. at 690 n.11. In the case at bar, the Court of Appeals decided the question left open in *Banks* by ruling that the petitioner's *Giglio* claims were procedurally barred as not having been separately exhausted from his *Brady* claims.

Bagley and *Agurs* call for an opposite result. In *Agurs*, the Court noted that the rule of *Brady* applies in three "quite different situations," all involving the discovery, after trial, of information which had been known to the prosecution but unknown to the defense. *Agurs*, 427 U.S. at 103. The Court cited to *Giglio* in its discussion of the first of the three situations, namely, where undisclosed evidence

demonstrates that the prosecution's case includes perjured testimony that could have affected the judgment of the jury. *Id.*

Similarly in *Bagley*, the Court noted that "the *Brady* rule has its roots in a series of cases dealing with convictions based on the prosecution's knowing use of perjured testimony." *Bagley*, 473 U.S. at 679 n.8.

The Court of Appeals in the case at bar, contrary to *Brady, Bagley* and *Agurs*, and like the Court of Appeals in *Banks*, treated the petitioner's *Brady* claim as separate and distinct from a *Giglio* claim. Both courts erred. Review is sought to address this important and recurring question.

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit be granted

Respectfully submitted,

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